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IN THE

Supreme Court of the United States

October Term, 1957

No. 756

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

No. 757

RADIO CORPORATION OF AMERICA, COLUMBIA BROADCASTING SYSTEM, INC., CAPITOL RECORDS, INC., LOEW'S INCORPORATED, DECCA RECORDS, INC., and CORAL RECORDS, INC.,

Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

HOMER I. MITCHELL,
CHARLES G. BAKALY, JR.,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Columbia Broadcasting System, Inc., CBS Television Film Sales, Inc., Radio Corporation of America, National Broadcasting Company, Inc., California National Productions, Inc. and Capitol Records, Inc.

O'MELVENY & MYERS,
Of Counsel.

ALFRED I. ROTHMAN,
523 West Sixth Street,
Los Angeles 14, California,
Attorney for Loew's Incorporated, Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television Service, Inc.

LOEB & LOEB,
Of Counsel.

AVERILL C. PASAROW,
325 West Eighth Street,
Los Angeles 14, California,
Attorney for Decca Records, Inc. and Coral Records, Inc.

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Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

POINT I.

The Judgments Below Are Final Within the Meaning of 28 USC Section 1257 and the Appeals Are Ripe for Decision.

Appellees make two contentions in Point I of their argument. First, they contend that this Court does not

have jurisdiction of these appeals because they are not appeals from final judgments. Second, they contend that if this Court does have jurisdiction because the appeals are from final judgments, it should not exercise its jurisdiction. Appellees err in both contentions.

A. The Judgments Below Are Final Within the Meaning of 28 USC Section 1257.

The judgments appealed from were entered in proceedings for writs of mandate.* Appellees assert that the judgments below are not final because the writs of mandate ordered the Los Angeles Superior Court to proceed with certain underlying litigation and that therefore there is remaining litigation which has not ended. Appellees rely upon *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 127; *Republic Gas Co. v. Oklahoma,* 334 U. S. 62, 70-72; and *Cobbledick v. United States,* 309 U. S. 323, 326. These cases are not in point. They were not concerned with whether judgments in separate proceedings for extraordinary writs are final but involved whether certain orders and judgments in the same action are final judgments within the meaning of 28 USC Section 1257. In *Radio Station WOW,* a judgment which directed immediate possession of property but which ordered an accounting was held to be a final one. In *Republic Gas Co. v. Oklahoma,* an order of the Corporation Commission ordering appellant to take gas ratably from another's wells but leaving for future determination the terms and conditions of such taking was held not to be a final

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*Appellees in note 1 on p. 4 of their Motion to Dismiss or Affirm state that the writs of mandate were issued after some of the notices of appeal were filed. This fact does not mean that those appeals were prematurely taken. See *Market Street R. Co. v. Railroad Commission,* 324 U. S. 548, 551-552.

judgment. In *Cobbledick v. United State*, an order denying a motion to quash a subpoena was held not to be a final one.

In determining whether a judgment was final within the meaning of 28 USC Section 1257, this Court has long distinguished judgments in actions for extraordinary writs (which contemplate no further proceedings in the same action but do contemplate further proceedings in the action to which the writ is addressed) from judgments or orders which contemplate further proceedings in the same action. Mr. Justice Holmes stated in *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30, 31:

> "Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code, Act of March 3, 1911, c. 231, §237, 36 Stat. 1087, 1156, under the statutes of Alabama and by the common law. Code of 1907, §§4864-4867, 4872. *Weston v. Charleston*, 2 Pet. 449, 464, 465. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought."

This Court has continuously followed this rule. See *Madruga v. Superior Court*, 346 U. S. 556, 557; *Rescue Army v. Municipal Court*, 331 U. S. 549, 565; *Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 293; *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 14; *Michigan Central R. Co. v. Mix*, 278 U. S. 492, 494; *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U. S. 200, 206.

B. These Appeals Are Ripe for Decision.

Appellees contend that "even though statutory grounds of appeal from a final judgment may be present, adequate reasons may impel this Court not to exercise such jurisdiction."* In support of this contention appellees rely on *Rescue Army v. Municipal Court*, 331 U. S. 549, 568, *et seq.* There, this Court held that it would not pass upon the federal questions in a case on appeal from a final judgment in a prohibition proceeding because the questions were presented in a general and abstract form and not in a narrow and clear-cut form and because the statutes had not been construed by the courts of the state. *Id.*, p. 584. See; also *Government and Civic Employees Organizing Committee, CIO v. Windsor*, 353 U. S. 364, 366; *Albertson v. Millard*, 345 U. S. 242, 245, citing *Rescue Army* as authority for the above rules. Neither of those obstacles to review is present in the cases at bar. In these appeals the constitutional question "rests upon a very narrow premise."** The question is not general or abstract. The California Supreme Court "on the basis of the extensive record before it"*** construed Section 412, California Code of Civil Procedure, and held that under the circumstances present it did not contravene the Fourteenth Amendment. All facts relevant to a decision of the federal question raised below appear in the record now before the Court. Future proceedings in the underlying litigation will not serve to clarify it. The federal question presented is ripe for decision.

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*Motion to Dismiss or Affirm, p. 14.

**Motion to Dismiss or Affirm, p. 16.

***Motion to Dismiss or Affirm, p. 17.

There are compelling reasons why this Court should now decide the question of whether the California courts have jurisdiction to proceed against these appellants. The underlying litigation is a controversy between two factions within the American Federation of Musicians. While certain causes of action for money are stated against the Federation, no such causes of action are stated against these appellants. It is alleged that these appellants are neutral in respect to the basic controversy. [R. Vol. Two, p. 26.] The companies were named as defendants only because they make payments to Samuel R. Rosenbaum pursuant to certain agreements which appellees claim should be cancelled, it being appellees' claim that the payments due thereunder should be made to appellees.

Shortly after appellees filed their action in California, Rosenbaum filed an action in New York for declaratory relief in which he seeks an adjudication that the agreements under which the companies make payments to him are valid. Thus there are two actions involving essentially the same issues, each proceeding toward a trial on the merits.

If the federal question presented to this Court is decided now on the merits, at least one-half of the expense of engaging in both actions would be avoided. If this Court decides that the California court cannot constitutionally exercise jurisdiction over Samuel R. Rosenbaum, then as to these appellants the underlying actions cannot proceed. [Jurisdictional Statement App. B, p. 15.] If this Court decides that the California court has jurisdiction over Rosenbaum the New York courts will undoubtedly hold that the New York action must abate pending determination of the California actions. If this

Court does not decide the constiutional question now presented, both the California and New York courts will proceed with their respective actions.*

Furthermore, if this Court does not rule on the merits of these appeals, the California judgments will become final. However, the courts of New York need not give full faith and credit to these judgments. The New York courts can be expected to adhere to the decisions of this Court in *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt,* and in reliance upon those cases to treat any California decision as a nullity. The result could be that appellants would be required to pay twice—once to appellees as may be required by a California judgment, and once to Rosenbaum as may be required by a New York judgment.

These appeals are from final judgments and are ripe for decision. These appellants should not be required to remain in both underlying actions at double expense and with the attendant risk of conflicting judgments.

POINT II.

The Federal Question Is Substantial.

In deciding the question presented in favor of appellees the Court below made two errors. First, it failed to follow controlling decisions of this Court and instead observed that the federal question presented in the cases at bar had never before been decided by this Court.** Second, it held that "relevant contacts" with California of parties *other than* Rosenbaum permitted the Los Angeles Superior Court to exercise jurisdiction over

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*See *Rosenbaum v. Melnikoff*, 169 N. Y. S. 2d 194, wherein motions to dismiss the New York action were denied.

**Jurisdictional Statement App. A, p. 6.

him by substituted service of process and exclude him from his interest in certain agreements with these appellants.* We have pointed out in our Jurisdictional Statement (pp. 14-20) the reasons why the decisions below are in conflict with previous decisions of this Court. They will not be repeated here.

The court below believed that relevant contacts permitted the exercise of jurisdiction by the Los Angeles Superior Court. The contacts relied upon were contacts of parties other than Rosenbaum.**

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*Jurisdictional Statement App. A, p. 11.

**The only passage of the court's opinion that specifies the contacts it considered relevant is as follows :

> "The obligation plaintiffs seek to enforce grows out of their employment by defendants [appellants] here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state. Moreover, fairness to the defendants who are personally before the court also demands that the conflicting claims of the trustee be subject to final adjudication." [Jurisdictional Statement App. A, p. 11.]

The court erroneously summarized the contractual relationships involved. The employment of some of the appellees in California was not the consideration given to the companies for entering into the agreements involved in the basic actions. The consideration secured by the companies upon entering into the several labor agreements with the Federation was its promise that the appellant companies could employ members of the Federation at not less than specified wage rates and under specified working conditions. The work performed by appellees in making phonograph recordings was consideration not for the collective bargaining agreements but for the promises of the companies contained in the individual contracts made between appellants and appellees when a particular phonograph record or motion picture was produced. The latter agreements are not, of course, involved in these proceedings. And in any event, even if work done in California was in part the consideration received by appellants for the payments involved, it was not consideration given or received by Rosenbaum. His right is to receive payments from appellants in New York and to use the monies received pursuant to contracts negotiated, executed, delivered and accepted in that state.

Contacts of persons other than the nonresident with the state attempting to exercise jurisdiction are not a basis for permitting the exercise of jurisdiction over the nonresident. The rule that allows personal jurisdiction over a nonresident to be predicated upon his contacts with the state is based upon principles of fairness and substantial justice. It seems to us obvious that if fairness is the test of a state's power to determine the rights of a nonresident, it must be fairness in terms of the reasonableness of compelling the nonresident to appear and defend his rights in that state rather than another. See Sobeloff, "Jurisdiction of State Courts Over Non-residents in Our Federal System", 43 Cornell L. Q. 196, 208. Tangible property is necessarily located in a particular state and subject to regulation and protection there. It is, accordingly, reasonable to require a non-resident who claims to own such property to appear and defend his rights in the state where it is situated. Intangible property, however, is not necessarily located in any state. It is nothing more than a right to bring a lawsuit, a right which can be said to be located in a particular state only in the sense that its owner may go there if he chooses, and, if he can obtain jurisdiction over the person of his debtor, bring suit to compel payment. The fact that a nonresident *could* bring suit in a state to enforce his intangible rights, because persons whom he has the power to sue are subject to process there, is no indication that it is fair to force him to litigate in that state rather than in others with which he has had some substantial contact. If jurisdiction to adjudicate intangible

rights is a matter of fairness and is to be decided in terms of contacts, the only contacts that are relevant are those which connect the nonresident defendant to the state that wishes to compel him to appear. Contacts that others may have had with the state have no bearing on fairness to him.

The court below, after relying upon California contacts of persons other than Rosenbaum, attempted to justify its conclusion that an assumption of jurisdiction over Rosenbaum in these cases was fair by reasoning that since substituted service of process in such cases as *Harris v. Balk*, 198 U. S. 215, is permissible and since (according to the court's view) there is no significant distinction between the nonresident in *Harris v. Balk* and Rosenbaum here, it must be fair to permit jurisdiction over Rosenbaum by substituted service of process. The flaw in this reasoning is twofold. First, as pointed out in our jurisdictional statement, the plaintiff in *Harris v. Balk* alleged that the resident defendant was obligated to pay money to the nonresident and the plaintiff sought to enforce that obligation whereas here the plaintiff alleged that the resident defendant was *not* indebted to the nonresident defendant. Second, the foreign garnishment procedure approved in *Harris v. Balk* was not based on fairness. The holding that a defendant could be subjected to suit in any jurisdiction where the person of his debtor could be caught and served with process was accomplished exclusively by reasoning that the plaintiff asserted the right of the nonresident and thus pro-

ceeded upon the theory that there was property of the nonresident which could be dealt with by the courts of the state in which the debtor was found. In *Pennoyer v. Neff*, 95 U. S. 714, this Court had held that power to adjudicate could be asserted when (and only when) physical power could be exercised over the person or the property of a nonresident defendant. *Harris v. Balk* followed that principle, predicating jurisdiction on the fiction rather than disturb the symmetry of a logical system. To say that *Harris v. Balk* justifies an assumption of jurisdiction where the plaintiffs deny that the nonresident defendant has property within the state ignores the whole rationale of *Harris v. Balk*. In such a case there is not even a fiction upon which to base jurisdiction that admittedly cannot be based on anything else.

The court below erroneously distinguished controlling decisions of this court and incorrectly applied the rule of "revelant contacts" to the facts in these cases.

POINT III.

Rosenbaum Is an Indispensable Party to All Relief Sought Against These Appellants and They Have Standing to Raise the Question Presented.

Appellees contend in this Court, just as they have contended in each of the courts below, that Rosenbaum is not an indispensable party to that part of the *Anderson* case which concerns payments to Rosenbaum computed on the basis of 21% of the minimum wage scale rate paid to musicians in the production of phonograph records. They state that the agreement which provides for

such payments is the labor agreement and that Rosenbaum is not a party to the labor agreement. The courts below have rejected this argument and have held that Rosenbaum is an indispensable party to all of the relief sought against these appellants. [Jurisdictional Statement App. A, p. 3; App. B, p. 15.] The courts below have so held because under the provisions of the trust agreement, these appellants expressly agreed with Rosenbaum that they would pay him the sums measured by 21% of the minimum wage rate scale paid to musicians in the production of phonograph records. [R. Vol. Two, pp. 76, 78.] Under the labor agreement, these appellants also agreed with the Federation that they would pay these sums to Rosenbaum.

Appellees desire to cancel Rosenbaum's interest in the trust agreement. This they cannot do without necessarily affecting his rights under such agreement. Rosenbaum is an indispensable party to all of the relief sought against these appellants.*

This Court in *Standard Oil Co. v. New Jersey*, 341 U. S. 428, 431, approved the standing of a company personally served with process in New Jersey to contest by appeal the validity under the Fourteenth Amendment of a New Jersey statute which authorized substituted service of process upon nonresident stockholders who were indispensable parties in actions for escheat of their

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*See *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P. 2d 1163; *Bank of California v. Superior Court*, 16 Cal. 2d 516, 522, 106 P. 2d 879, 883-884; *Willis v. Lauridson*, 161 Cal. 106, 117, 118 Pac. 530.

contractual rights under stock certificates issued by the company. Moreover, the courts below held that these appellants have standing to raise the question presented.

Respectfully submitted,

HOMER I. MITCHELL,

CHARLES G. BALALY, JR.,

Attorneys for Columbia Broadcasting System, Inc., CBS Television Film Sales, Inc., Radio Corporation of America, National Broadcasting Company, Inc., California National Productions, Inc., and Capitol Records, Inc.

O'MELVENY & MYERS,
Of Counsel.

ALFRED I. ROTHMAN,

Attorney for Loew's Incorporated, Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television Service, Inc.

LOEB & LOEB,
Of Counsel.

AVERILL C. PASAROW,

Attorney for Decca Records, Inc. and Coral Records, Inc.

Dated March 19, 1958.